No. 93 - _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

LAWRENCE ANDRIOLA, JAMES A. BURKE, THOMAS J. CAPANELLI, JOHN CIORCIARI, LAWRENCE E. CONNORS, JOAQUIM P. DASILVA, ALFRED J. PAUVEL, ANTHONY L. FRAVOLA, JOSEPH J. KENNINGTON, ROBERT W. LINHART, JOSEPH LUNZ, JOSEPH MARAGLINO, PATRICK H. MCDERMOTT, JAMES R. MCENROE, THOMAS M. MCMAHON, PETER T. MORGAN, JOHN F. MULVEY, RAYMOND NEGRYCZ, JAMES W. O'BRIEN, ROBERT J. O'HARA, RUSSELL L. OLSON, JOHN F. PETERSON, MICHAEL JOHN PUZZIFERRI, THOMAS F. REGAN, RICHARD J. SMITH and JOSEPH SOLAZZO,

-and-

Petitioners,

MICHAEL ANTINORO, PETER BIANCHINI, ROBERT BRADLEY, ALLEN DELGANDIO, EDWARD ELLISON, HERBERT FISCHER, WILLIAM GRONEMAN, JOHN GULOTTA, ADOLF HUTTER, JOHN KLEEHAAS, JAMES KLESS, DOUGLAS KRUGER, CORNELIUS LEHANE, CHARLES MCCARTHY, DONALD MCCULLOUGH, DENIS NEIGAN, LEROY O'NEIL, ERIC REHREIN, JOHN REILLY, DENNIS SCANLON, FRANCIS SHANAGAN, JOHN STACK, PATRICK WELSH, SAM WHITE, CHARLES WILLIAMS and RICHARD ABBOTT,

-against-

Intervenors-Petitioners,

JUAN U. ORTIZ, as City Personnel Commissioner, Department of Personnel, and as Chairman of the Civil Service Commission of the City of New York, and JOSEPH E. SPINNATO, as Fire Commissioner of the City of New York,

-and-

Respondents,

WILLIAM BARRETT, JOSEPH BACCARI, JAMES O'DONNELL, on behalf of themselves and other successful candidates on Promotion List 5608 (Lieutenant, NYC Fire Department) as members of Lieutenant Eligible Association 5608,

Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution the Respondents' denial of retroactive seniority and wages to the Petitioners is unconstitutional.

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Petitioners,

-and-

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Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

PARTIES

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.*

OPINIONS BELOW

The opinion of the Court of Appeals for the State of New York, is officially reported as *Andriola v. Ortiz*, 82 N.Y.2d 320, 604 N.Y.S.2d 530, 624 N.E.2d 667, (1993) and appears at Appendix A hereto, at pages *1a - 14a*. The New York State Supreme Court Appellate Division, First Department decision is officially reported as *Andriola v. Ortiz*, 186 A.D.2d 423, 588 N.Y.S.2d 280 (1st Dept. 1992), *leave to appeal granted*, 81 N.Y.2d 710, 599 N.Y.S.2d 804 (1993) and appears at Appendix B, pages *15a - 17a*. The New York State Supreme Court opinion is not officially reported and appears as Appendix C, at pages 18a - 32a, hereto.

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* Four original Petitioners, Lunz, Maraglino, Negrycz and O'Hara retired during the course of litigation and a separate order was entered by the New York Supreme Court with respect to the relief awarded the Petitioners-retirees, which was appealed separately from the case at bar.

JURISDICTION

The decision of the Court of Appeals of the State of New York was entered on November 18, 1993. In accordance with Rule 13.1 of this Court, this petition is filed within 90 days after the entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) because the decision of the Court of Appeals draws into question a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provision

The "Equal Protection Clause" of the Fourteenth Amendment of the United States Constitution, U.S. Const. Amend. XIV, § 1, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutory Provision

Section 61(1) of the New York Civil Service Law, provides:

> Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion.

STATEMENT OF THE CASE

This case presents the question whether the respondents denied petitioners equal protection of the laws in violation of the Fourteenth Amendment when respondents denied petitioners retroactive pay and seniority benefits to the date they would have been promoted but for the wrongful grading of their civil service examination. The opinion below decided this constitutional issue in a way that conflicts with the equal protection analysis this Court has articulated in various decision of this Court, particularly *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); *Vance v. Bradley,* 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979); *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), *reh'g denied,* 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970), *Turner v. Fouche,* 396 U.S. 346, 362, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970).

A. Statement of Facts

The petitioners and intervenors-petitioners herein are all members of the New York City Fire Department who participated in a civil service examination for promotion to lieutenant, "Exam No. 0511". Respondents are the New York City governmental agencies responsible for the administration and grading of the exams as well as the employment and promotion of the candidates, collectively referred to herein as the "City". Intervenors-Respondents are a group of firefighters who had passed the exam and were deemed eligible for promotion, collectively referred to as the "eligibles". Petitioners had brought a proceeding in state court to challenge the grading of their exams,[1] alleging that certain of their answers had not been properly credited. The petitioners' grades were important since if they are deemed to have passed, they are placed on an eligibles list for promotion in accordance with their rank among the candidates. A hearing was conducted and it was determined that certain of the petitioners' answers were not properly credited. By order of the New York Supreme Court dated July 11, 1988 and entered on August 5, 1988, the New York State Supreme Court ordered the City to regrade the examination and to compile a special eligibles list based on the regraded scores. (App. F, at 41a). The City regraded the exam and issued a revised eligible list in June of 1989.

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[1] New York Civil Practice Law and Rules (CPLR), Article 78 provides for judicial review of final determinations made by administrative agencies of government. CPLR § 7801 *et seq.*

The petitioners, later being joined by various intervenors-petitioners, collectively referred to herein as "petitioners", moved for an order modifying the August 5, 1988 order to grant the petitioners retroactive salary and seniority benefits to the date they should have been promoted had the City correctly graded their exams in the first instance. Respondents have opposed this motion based on New York Civil Service Law, Section 61, which provides the appointing agency, here the New York City Fire Department, hereinafter the "FDNY", the discretion to promote one of the three highest ranking candidates on the eligible list, and therefore the option to "pass over" a candidate. The City argued that Civil Service Law, § 61 precludes the relief the petitioners sought since they had no entitlement to promotion due to this "one-in-three" rule. Petitioners countered this argument by submitting evidence that the FDNY always promoted in strict rank order and never passed over any candidates. Petitioners also argued in their Memorandum of Law in support of their motion that another candidate for promotion to lieutenant based on the same Exam No. 0511 had been awarded retroactive pay and benefits in *McKernan v. City of New York Civil Service Comm'n*, 121 A.D.2d 350, 503 N.Y.S.2d 572 (1st Dept. 1986), *appeal denied*, 69 N.Y.2d 607, 514 N.Y.S.2d 1025, 507 N.E.2d 321 (1987).[2] Petitioners argued that the

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[2] Although the petitioners did not allege equal protection violations in their Article 78 petition, the party who has prevailed in the trial court, as petitioners have, may assert in a reviewing court any ground in support of his judgment, whether or not it appeared in the initial pleadings. *See, Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491, 496, fn. 6.

McKernan case was controlling precedent because these petitioners were similarly situated to *McKernan* in that they had all been denied timely promotions due to the City's conduct. The City argued that *McKernan* did not control because McKernan missed an examination because of a line-of-duty injury and the issue there involved the City's undue delay in providing a make-up exam to which he was entitled to as a result of that line-of-duty injury.

B. Prior Proceedings

In a decision dated June 21, 1991, the New York Supreme Court granted petitioners' motion to modify the earlier judgment to include retroactive back pay and seniority. The Court found that such relief was the only appropriate relief to make the petitioners whole. (App. C, at 26a). The Court reasoned that since the petitioners had in fact already been promoted in strict rank order from the revised eligibles list, such relief would not in any way interfere with the FDNY's discretionary authority under the one-in-three rule. (App. C, at 23a). The Court noted that the *McKernan* case, involving the same promotional Exam No. 0511, was factually similar to this case, since McKernan too had already been promoted in rank order and that the petitioners here, and in *McKernan*, were "not asserting a right to be appointed but a right to equal benefits upon appointment". (App. C, at 22a). In an order dated September 18, 1991, and entered on October 31, 1991, the Court awarded, *inter alia*, the petitioners "retroactive back pay from the date that they should have been promoted through the date of their actual promotion, and full

seniority and pay longevity benefits, *nunc pro tunc* to the date that they would have been promoted had the exam initially been correctly scored...". (App. D, at 37a).

The respondents appealed said order to the New York State Supreme Court, Appellate Division, First Department. Petitioners argued in their appellate brief that they were entitled to those benefits under the principles of equal protection based on the *McKernan* case. The Appellate Division unanimously affirmed. (App. B, at 15a). The Appellate Division noted that petitioners were not asserting a right to be appointed but equal benefits upon appointment. The court also cited *McKernan* as controlling precedent. (App. B, at 16a).

The respondents then moved for leave to appeal to the Court of Appeals of the State of New York and were granted permission to appeal. On that appeal petitioners again argued that they were similarly situated to their colleague in the *McKernan* case and that the principles of equal protection require that petitioners be awarded the relief sought. Respondents argued that petitioners had no basis for their equal protection argument because they were not similarly situated to any other candidates who were promoted from the list since *McKernan* was distinguishable.

The Court of Appeals decision dated November 18, 1993, reversed the New York Supreme Court and Appellate Division decisions. (App. A, at 1a). The Court of Appeals held that to award such retroactive benefits violated the policy underlying Civil Service Law § 61 that competitive civil service examinees gain no entitlement to promotion by passing an examination for the position sought. (App. A, at 5a). The Court of Appeals rejected petitioners equal

protection argument finding that petitioners were not similarly situated to Mr. McKernan or any other candidates who had been granted retroactive benefits and that the City had established a reasonable basis for not adhering to the *McKernan* precedent. (App. A, at 7a).

REASONS FOR GRANTING THE WRIT

I. This Case Involves Important Constitutional Questions as to Whether The Equal Protection Clause of The Fourteenth Amendment Has Been Violated by The City's Refusal to Grant These Petitioners Retroactive Benefits That Have Previously Been Granted to Civil Servants Who Have Been Promoted Belatedly Due to Conduct Attributable Only to The City.

A. The City's Refusal to Grant These Retroactive Benefits And The Court of Appeals' Decision Violates The Equal Protection Clause of The Fourteenth Amendment Because The Challenged Classification is Not Relevant to The Achievement of The Articulated Governmental Objective.

This case invites the Court to determine if petitioners, a group of civil service employees whose promotions were substantially delayed due to a grading error made by the City are entitled, under the Equal Protection Clause, to the same benefits upon promotion as another candidate whose promotion had been delayed due to the City's failure to provide a timely make-up exam to those unable to take the original exam due to line-of-duty injuries. Upon reviewing the facts of this case and the standard to be applied under the Equal Protection Clause, it must be concluded that such a differentiation is not reasonable and does not further any valid objective.

While this particular issue is one of first impression, this Court's standard of review for such a claim has been articulated in cases such as *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); as well as, *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171, 176 (1979) (whether the varying treatment of different groups is so unrelated to the achievement of legitimate purposes); *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), *reh'g denied*, 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970) (government action must be rationally based and free from invidious discrimination); *Turner v. Fouche*, 396 U.S. 346, 362, 90 S.Ct. 532, 541, 24 L.Ed.2d 567 (1970) (whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective). In accordance with these cases, the standard applicable in the instant case is whether the challenged classification rationally furthers the purpose articulated by the government agency. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 314, 49 L.Ed.2d at 525. To apply this test the classification and the governmental objective purportedly advanced by the classification must be identified. The classification must then be analyzed in order to determine whether it rests upon some difference that is related to an articulated objective so that all people similarly situated are treated alike. Applying this test to the case at bar, it must be concluded that the challenged classification is irrelevant and unrelated to the achievement of the governmental goal articulated by the City. The Court of Appeals decision is, therefore, counter to the well established analysis employed by this Court.

Petitioners have claimed throughout this litigation that they are similarly situated to other civil service employees who have been granted or awarded retroactive back pay and benefits. In particular, petitioners claim they are similarly situated to the petitioner in *McKernan v. City of New York Civil Serv. Comm'n.*, 12 A.D.2d 350, 503 N.Y.S.2d 572 (1st Dep't. 1986), who was promoted to lieutenant in the FDNY pursuant to the same examination as petitioners. The City argues that it properly did not grant the retroactive benefits to petitioners, despite such benefits having been awarded in *McKernan* due to a classification based on line-of-duty injury. The City claims that *McKernan* was awarded retroactive seniority in accordance with a policy of the FDNY to award retroactive seniority to firefighters who, after missing an examination because of a line-of-duty injury, take and pass a make-up examination. The City further argued that it was because of this policy that the New York State Supreme Court, Appellate Division, First Department, held that Mr. McKernan was entitled to back pay as well as seniority. The City argued, therefore, that the petitioners were not similarly situated to *McKernan*, and the majority opinion of the Court of Appeals agreed. However, the *McKernan* decision makes clear that the basis for the back pay relief awarded was to make Mr. McKernan whole and to "rectify the consequences of delay in administering the make-up exam". *McKernan*, 121 A.D.2d at 352, 503 N.Y.S.2d at 574. The consequence, as identified by the court, was an untimely promotion. The court's decision, while recognizing Mr. McKernan's right to a make-up exam because of his line-of-duty injury, did not make the award based on that

line-of-duty injury. Instead, the court awarded the back pay because, due to conduct on the part of the City, Mr. McKernan was not timely promoted due to no fault of his own. The petitioners here, who took Exam No. 0511 as did Mr. McKernan, were also denied a timely promotion due to conduct of the City, namely a failure to properly grade their exams. Therefore, petitioners are similarly situated as Mr. McKernan in all legally significant ways.

As indicated earlier, the City's stated objective in denying this retroactive pay and seniority for petitioners is to preserve the so called "one-in-three" rule and the discretionary authority it confers on the various agencies of city government that are subject to the New York Civil Service Law. The challenged classification does nothing to further that objective, and therefore, is not rationally related to the achievement of a valid objective.

The dissenting opinion of Judge Titone in the Court of Appeals decision, while not specifically addressing the equal protection argument, recognized that the majority's denying these petitioners the retroactive benefits and departing from prior precedent did not further the objective of preserving the one-in-three rule or the discretionary authority of the FDNY. Judge Titone states: "...the majority has failed to articulate any compelling policy rationale to justify its departure from *Abrams* or the withholding or retroactive benefits from civil servants who have been harmed, not because of the appointing authority's protected exercise of discretion, but due to that body's erroneous grading of the promotional exam. Accordingly, I respectfully dissent from that portion of the majority's holding which deprives petitioners and intervenors who have already been

promoted by the Fire Department of their retroactive relief." (App. A, at 10a). Judge Titone goes on to state: "As articulated by the majority, the purpose of precluding the courts from fashioning mandatory appointment-related remedies is to preserve the historical discretion reserved to the governmental appointing authorities.... That purpose does not preclude awards of retroactive pay and benefits where the appointing authority *has* exercised its discretion by selecting the aggrieved candidates for appointment." (App. A, at 11a). This supports petitioners' position herein, that the differentiation between Mr. McKernan and these petitioners, and the denial of these benefits to these petitioners cannot be concluded to further the articulated governmental purpose.

Mr. McKernan was subject to the one-in-three rule regardless of the fact that he had the right to take a make-up because of a line-of-duty injury. His line-of-duty injury status gave him no more entitlement to promotion than if he had not been injured. Once the City administered the make-up and his exam was graded and he was ranked on the eligibles list, Mr. McKernan too could have been "passed over" under the one-in-three rule.[3] Therefore, his having been on medical leave due to a line-of-duty injury, entitling him to a make-up exam, has absolutely no relationship to the objective of preserving the one-in-three rule or the discretionary authority of the appointing agency in making promotions from an eligibles list. Under the

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[3] It should be noted that neither McKernan, nor any of the petitioners herein had been passed over. In fact, no one had been passed over and promotions were based on strict rank order.

standards articulated by this Court, as cited above, the denial of these benefits has no rational relationship to the objectives and, therefore, such denial violates the equal protection clause.

In *Abrams v. Bronstein*, 33 N.Y.2d 494, 354 N.Y.S.2d 926, 310 N.E.2d 528 (1974), the Court of Appeals for the State of New York was faced with a very similar case as the one at bar. In that case the Court went through a concise constitutional analysis under the Equal Protection Clauses of both the State and Federal Constitutions. In that case one group of police lieutenants had brought an Article 78 proceeding, similar to the one here, challenging the validity of some of the approved answers to the exam. That Article 78 proceeding was entitled *Amendola v. Hoberman*, (not officially reported), and was settled by a stipulation, which included provisions that the *Amendola* petitioners would be granted retroactive salary increments upon actual appointment to lieutenant. The *Amendola* petitioners were then in fact promoted and granted these retroactive benefits. Thereafter, another group of lieutenants that were promoted off the same list, and who had not participated in the *Amendola* petition filed the Article 78 petition in *Abrams v. Bronstein, supra*, challenging the City's refusal to pay them the same retroactive benefits as those who had participated in the *Amendola* petition. *Abrams*, 33 N.Y.2d at 491, 354 N.Y.S.2d at 929. They challenged this differentiation based on equal protection grounds. The Court noted that had the exams been properly graded the promotions would have been made in accordance with the candidates rank on the list and the candidates would have begun performing as lieutenants and

they would have been receiving their annual salary increments. The Court stated "[t]he fact that these events did not come to pass as outlined above is not attributable to any of the candidates, either the *Amendola* or the *Abrams* petitioners..." *Abrams*, 33 N.Y.2d at 495, 354 N.Y.S.2d at 931. The same is true here. The fact that both Mr. McKernan and the petitioners herein were denied timely promotions are not attributable to any conduct on their part, but rather such untimely promotions were due to the conduct of the City. Therefore, the petitioners in the instant case have the same right to retroactive benefits as the *Abrams* petitioners. The City also raised the one-in-three rule in *Abrams* as a basis to deny retroactive benefits. The court rejected the City's argument stating: "In fact, however, the petitioners were all appointed in regular order according to the listings. Furthermore, this justification misses the point because the petitioners are not asserting a right to be appointed but a right to equal benefits upon appointment." *Abrams*, 33 N.Y.2d at 493, fn. 6, 354 N.Y.S.2d at 930. The same is true here. The petitioners herein have all been appointed in rank order and now seek equal benefits upon appointment. The petitioners' benefits should be equal to those awarded in *McKernan* and *Abrams* as well as to those candidates who were timely promoted as a result of Exam No. 0511. The petitioners herein are no less entitled to retroactive benefits than the *Abrams* petitioners, therefore, although *Abrams* involved a different agency and was decided long before the instant case, the fact is that these petitioners were also similarly situated to the *Abrams* petitioners. In the instant case, the Court of Appeals rejected the petitioners reliance on *Abrams* in their

equal protection argument, stating that petitioners were different from the *Abrams* petitioners because the petitioners were not similarly situated to any members of the FDNY, whereas the *Abrams* petitioners were similarly situated to the *Amendola* petitioners. However, for the reasons stated above, the petitioners herein are, in fact, similarly situated with *McKernan*, as well as the *Abrams* petitioners. In fact, these petitioners are actually entitled to these benefits because they are similarly situated to all the candidates who were promoted as a result of Exam No. 0511 since they all took and passed the exam and were deemed eligible by the FDNY to be promoted in strict rank order. The objective of preserving the FDNY's discretion to pass over candidates in accordance with the one-in-three rule cannot be furthered by denying these petitioners the same benefits as other civil service candidates who were wrongfully denied timely promotions due to conduct on the part of the governmental agency, or in fact other candidates who were promoted without delay from the same exam. Therefore, this Court's equal protection standard has not been satisfied and petitioners have been denied equal protection of the laws.

CONCLUSION

For these reasons, a writ a certiorari should be issued to review the opinion and judgment of the Court of Appeals.

Dated: *Garden City, New York*
February 8, 1994

Respectfully submitted,

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-and-

Petitioners,

MICHAEL ANTINORO, PETER BIANCHINI, ROBERT BRADLEY, ALLEN DELGANDIO, EDWARD ELLISON, HERBERT FISCHER, WILLIAM GRONEMAN, JOHN GULOTTA, ADOLF HUTTER, JOHN KLEEHAAS, JAMES KLESS, DOUGLAS KRUGER, CORNELIUS LEHANE, CHARLES MCCARTHY, DONALD MCCULLOUGH, DENIS NEIGAN, LEROY O'NEIL, ERIC REHREIN, JOHN REILLY, DENNIS SCANLON, FRANCIS SHANAGAN, JOHN STACK, PATRICK WELSH, SAM WHITE, CHARLES WILLIAMS and RICHARD ABBOTT,

-against-

Intervenors-Petitioners,

JUAN U. ORTIZ, as City Personnel Commissioner, Department of Personnel, and as Chairman of the Civil Service Commission of the City of New York, and JOSEPH E. SPINNATO, as Fire Commissioner of the City of New York,

-and-

Respondents,

WILLIAM BARRETT, JOSEPH BACCARI, JAMES O'DONNELL, on behalf of themselves and other successful candidates on Promotion List 5608 (Lieutenant, NYC Fire Department) as members of Lieutenant Eligible Association 5608,

Intervenors-Respondents.

APPENDIX

Appendix A - Opinion of The State of New York Court of Appeals, Decided November 18, 1993 (82 NY2d 320) [Pages 1a - 14a]

State of New York
Court of Appeals

In the Matter of Lawrence Andriola, et al.,

Respondents,

v.

Juan U. Ortiz, as City Personnel Commissioner, Department of Personnel, and as Chairman, of the Civil Service Commission of the City of New York, et al.,

Appellants,

and William Barrett, et al.,

Intervenors-Respondents.

Argued October 14, 1993, decided November 18, 1993

OPINION OF THE COURT

LEVINE, J.:

Petitioners and intervenors were New York City firefighters when petitioners brought the instant CPLR Article 78 proceeding challenging respondents' grading of 12 questions on a promotional examination for the position of Fire Department Lieutenant given October 31, 1981. Pursuant to the order of Supreme Court, New York

County, dated July 11, 1988, the examination was regraded and, as a result, a special eligible list was promulgated from which those petitioners then still on active duty were promoted to lieutenant, as were intervenors. Petitioners then moved for a modification of the July 11, 1988 order to provide for retroactive seniority benefits and back pay from the date each of them would have been promoted from the original eligible list had the examination been properly graded. They were joined in this request by intervenors. Additionally, four of the original petitioners who had retired before the revised promotional list was promulgated, but who had passed the written portion of the examination as regraded, sought retroactive seniority and back pay from the date they claimed they would have been promoted had the original examination been properly graded.

Respondents opposed any award of retroactive seniority benefits for back pay on the principal ground that to do so would be in derogation of their statutory discretion as a governmental civil service appointing authority to select for appointment or promotion any one of the three highest persons on the eligible list, as provided under Civil Service Law § 61 (the "one-in-three rule"). Supreme Court rejected this objection. It reasoned that, because petitioners and intervenors had already been promoted from the special eligible list following the regrading of the examination, awarding them retroactive seniority benefits and back pay to the date they would have been promoted had the examination been properly graded in the first instance could not be said to impinge on respondents' statutory discretion under the one-in-three rule.

Such an award, the court held, merely served to "make whole" the petitioners still in active service for being deprived of the earlier promotions they would have received. Furthermore, the court found that the New York City Fire Department historically and throughout the pertinent period had followed a consistent policy of promoting to the ranks of lieutenant and above the highest persons on the applicable list. This abdication of discretion also obviated any need to preserve respondents' discretion under the one-in-three rule, the court concluded.

As to the four original petitioners who had retired from service before the special eligible list was promulgated, Supreme Court also fashioned a rather intricate remedy to place them in the same position they would have been in had their examinations initially been graded properly.

The Appellate Division affirmed (186 AD2d 423). Relying on its own decision in *Matter of McKernan v City of New York Civil Serv. Commn.* (121 AD2d 350, *lv denied* 69 NY2d 607) and this Court's decision in *Matter of Abrams v Bronstein* (33 NY2d 488), the Court concluded that the award of retroactive benefits did not interfere with respondents' statutory discretion under the one-in-three rule, because it merely placed petitioners and intervenors in the same position that they would have been in had the examination been correctly graded in the first instance. We granted leave to consider whether the award of retroactive seniority benefits and back pay antedating petitioners' and intervenors' actual promotions to Fire Department Lieutenant is barred by reason of Civil Service Law § 61.

We reverse. Our decisions repeatedly have acknowledged the importance of the discretionary

governmental appointive power embodied in Civil Service Law § 61, and have rejected attempts to invoke the aid of the courts to limit the reasonable exercise of that discretion (*see, City of Schenectady v State Div. of Human Rights*, 37 NY2d 421, 430; *Matter of Cassidy v Municipal Civil Serv. Commn. of City of New Rochelle*, 37 NY2d 526, 528-529; *Matter of Berger v Walsh*, 291 NY 220, 223). Consistent with our adherence to the historical policy upon which Civil Service Law § 61 is based, we have held that a person successfully passing a competitive Civil Service examination does *not* acquire any "legally protectable interest" in an appointment to the position for which the examination was given (*Matter of Cassidy v Municipal Civil Serv. Commn. of City of New Rochelle, supra*, at 529; *see also, Matter of Deas v Levitt*, 73 NY2d 525, 532, *cert denied* 493 US 933), nor "thereby gain a vested right to appointment to the position" (*Hurley v Board of Educ. of City of New York*, 270 NY 275, 279).

It follows from the foregoing that petitioners and intervenors would not have acquired any enforceable right or even any legally cognizable interest in appointment to the position of Fire Department Lieutenant if the examination they initially took for that position had been properly graded and resulted in their achieving passing grades. This would have remained so despite the existence of a past practice of the New York City Fire Department to promote the top graded examinees to lieutenant from the eligible list since, surely, no court would find it arbitrary or capricious on the part of the appointing authority for it to abandon that practice at any time in favor of the exercise of its statutory discretion under Civil Service Law

§ 61 (*see, Matter of Delicati v. Schechter,* 3 AD2d 19, 23-24 [Breitel, J.]). Indeed, petitioners and intervenors have not argued that the practice of the Fire Department to appoint lieutenants strictly on the basis of test scores created any enforceable entitlement in their favor to promotion from the eligible list if the examination had been properly graded in the first instance.

One must conclude from the foregoing that Supreme Court's direction that petitioners and intervenors receive retroactive seniority benefits and back pay -- in effect thereby mandating their *retroactive promotion* to Lieutenant -- is fundamentally inconsistent with the letter and spirit of Civil Service Law § 61, and with our previously cited holdings that the only remedy a Civil Service examinee in the competitive class is entitled to for defects in the appointive or promotional process such as that presented here is *not* appointment or promotion, but a judicial direction for reconsideration after the prior defect has been corrected (*see, City of Schenectady v State Div. of Human Rights, supra; Matter of Berger v Walsh, supra*). The retroactive promotions to lieutenant effected by Supreme Court's order cannot be rationalized as merely making petitioners and intervenors "whole". This point was well made in *Matter of State Div. of Human Rights (Cottongim) v County of Onondaga Sheriff's Dept.* (71 NY2d 623). In that case, we contrasted the available remedy for a wrongfully discharged employee (as was therein established) with that for employees not fairly considered for appointment or promotion (as is the case here) (*id.* at 634). We held in *Matter of State Div. of Human Rights (Cottongim)* that reinstatement is an appropriate remedy in

the case of a wrongfully discharged employee; it restores to the employee that which he or she possessed before the wrong was committed (*id.*). On the other hand, we explained the holdings in our previous decisions dealing with defects in the appointment process that "where a person has not been considered fairly for an appointment by a public employer, the remedy that *generally will make the individual whole* *** is that the *individual be fairly considered* for the appointment. These cases recognize that it may be improper to go further and require that the person be appointed to the position because this could award more than a complainant was entitled to before the [defect] took place" (*id.* [emphasis supplied]).

So too here, when petitioners established a defect in the promotional process, i.e., the improper grading of the examination, the appropriate remedy to make them *whole* under our precedents was to correct the defect they established, by regrading the examinations and promulgating a special eligible list, and then giving them due consideration for promotions from their positions on the new list *(Matter of State Div. of Human Rights [Cottongim] v County of Onondaga Sheriff's Dept., supra)*. This remedy, of course, ultimately led to their actual promotion, but that result was not dictated in order to make them whole.

Accordingly, Supreme Court erred when it granted relief clearly in excess of the appropriate remedy here, by effectively dictating the retroactive promotion of petitioners and intervenors. This result, as we have concluded, violated the policy underlying Civil Service Law § 61 that competitive Civil Service examinees gain no cognizable legal rights to employment or promotion by passing an

examination for the position sought. The courts may not dictate retroactive appointment or promotion in violation of this strong State policy on the factual supposition, no matter how reasonable, that the appointive process worked properly initially, the candidate would have received earlier appointment or promotion.

To the extent that the decision in *Matter of McKernan v City of New York Civil Serv. Commn.* (121 AD2d 350, *supra*) supports the award of retroactive seniority benefits and back pay as appropriate relief on a successful challenge to deficiencies in the Civil Service appointive or promotional process such as was presented here, that decision is disapproved. Moreover, petitioners and intervenors reliance on the *McKernan* case to establish their right to retroactive seniority benefits and back pay under the Equal Protection Clauses of the Federal and State Constitutions (US Const, 14th Amend; NY Const, art 1, § 11) is also unavailing. The prevailing party in *Matter of McKernan (supra)* and petitioners here are not similarly situated, and respondents here have clearly established here a reasonable basis for not adhering to the *McKernan* precedent in their treatment of petitioners and intervenors.

Finally, nothing that we have said here is inconsistent with our decision in *Matter of Abrams v Bronstein* (33 NY2d 488). In *Matter of Abrams*, a group of New York City police officers who had brought a separate court challenge to the grading of a police lieutenant examination entered into a stipulation with the City of New York that they would receive retroactive benefits, including salary increments, in the event that they won their suit and as a result were eventually appointed lieutenant from the

revised eligible list (*id.* at 490-491). The petitioners in *Matter of Abrams* had not joined in the prior litigation, but had taken the same examination and had been promoted to police lieutenant from the same revised list (*id.* at 491). We held in *Matter of Abrams* that equal protection prevented the City of New York from discriminating between petitioners and their peers as to the retroactive benefits in question merely because the latter group had brought the lawsuit challenging the grading of the promotional examination (*id.* at 494-495). In the instant case, petitioners and intervenors have not pointed to any similarly situated members of the New York City Fire Department who have received the retroactive benefits they seek here. Thus, *Matter of Abrams v Bronstein (supra)* does not support their claim.

For all the foregoing reasons, the order of the Appellate Division should be reversed, with costs, and the motion to modify the July 11, 1988 order and judgment of Supreme Court denied.

Titone, J. (concurring in part and dissenting in part).

I concur in the majority opinion to the extent that it bars the four retired petitioners, who have not been promoted by respondent Fire Department to the position of Lieutenant, from receiving the claimed retroactive relief. As the majority concludes, Supreme Court improperly ordered their retroactive *promotion* and thereby usurped the discretionary authority of the appointing agency to make such appointment determinations under Civil Service Law § 61(1)'s "one-in-three" rule. However, in my view, the same rationale has no application in the context of court orders directing retroactive back pay and seniority benefits to individuals who have already been appointed or promoted and who are merely seeking to recover the benefits withheld as a result of a past wrong. The majority's failure to distinguish between the type of relief granted to the retired firefighters on the one hand -- retroactive *promotion* and benefits -- and to the promoted firefighters on the other -- retroactive benefits incidental to their promotion -- represents an unwarranted application of the "one-in-three" rule that has unnecessarily deprived a group of civil servants of the relief they deserve which in no way encroaches on any statutory discretion accorded to the Fire Department's appointing authority under the Civil Service Law. The Fire Department has already exercised that discretion, without court interference, in making the promotional appointments. Additionally, the award of retroactive benefits as incidental relief to the promoted firefighters is directly supported by this Court's precedent in

Matter of Abrams v Bronstein (33 NY2d 488). Beyond that, the majority has failed to articulate any compelling policy rationale to justify its departure from *Abrams* or the withholding of retroactive benefits from civil servants who have been harmed, not because of the appointing authority's protected exercise of discretion, but due to that body's erroneous grading of the promotional examination. Accordingly, I respectfully dissent from that portion of the majority's holding which deprives petitioners and intervenors who have already been promoted by the Fire Department of their retroactive relief.

Initially, I agree with the majority that no firefighter would "have acquired any enforceable right or even and cognizable interest in appointment to the position of Fire Department Lieutenant" had the original grading of the examination been proper and had they achieved passing scores (Maj. opn at 4). In fact, it is well-settled that the power granted to the appointing officer by Civil Service Law § 61(1)'s "one-in-three" selection rule clearly prevents the courts from directing that authority to appoint (Matter of *Cassidy v Municipal Civil Serv. Commn. of City of New Rochelle*, 37 NY2d 526, 528-529; *Berger v Walsh*, 291 NY 220, 222-223; Matter of *Delicati v Schechter*, 3 AD2d 19, 23), or reinstate (*see City of Schenectady v State Div. of Human Rights*, 37 NY2d 421, 430) a candidate (*cf., Matter of State Div. of Human Rights (Cottongim) v County of Onondaga Sheriff's Dep't*, 71 NY2d 623, 634; *Matter of Delicati, supra* at 23).

However, it does not necessarily follow, as the majority holds, that the existence of that rule also precludes a claim for retroactive benefits sought by petitioners who

have already, in fact, been appointed. As articulated by the majority, the purpose of precluding the court from fashioning mandatory appointment-related remedies is to preserve the historical discretion reserved to the governmental appointing authorities (Maj. opn at 3-4). That purpose does not preclude awards of retroactive pay and benefits where the appointing authority *has* exercised its discretion by selecting the aggrieved candidates for appointment.

Significantly, the "one-in-three" rule justification for precluding a court from directing an appointing authority to promote a candidate has never been extended by this Court to bar a grant of retroactive benefits to a candidate who has already been appointed by that authority. Indeed, substantially all of the cases that the majority cited involved petitioners who were denied judicial relief, including claims for retroactive pay and benefits, because they were primarily seeking to compel their appointment or reinstatement after being passed over or discharged (*see Matter of State Div. of Human Rights (Cottongim), supra; City of Schenectady, supra; Matter of Cassidy, supra; Berger v Walsh, supra; Delicati, supra*). None of those cases involved the denial of claims for retroactive benefits asserted by petitioners who had already been appointed to the post they sought.

The flaw in the majority's analysis here is its characterization of Supreme Court's directive as an order "mandating * * * retroactive promotion" (Maj. opn at 5). As the majority itself recognizes, however, Supreme Court did not order the *promotion* of those petitioners (*see* Maj. opn at 6-7); rather, in essence, the court ordered only that the promoted firefighters be given a retroactive appointment

date to facilitate the calculation of benefits wrongfully withheld. Indeed, those firefighters did not bring this proceeding to compel the commissioner to appoint them because they were "not fairly considered for appointment or promotion" (Maj. opn at 6). Rather, they seek, as relief incidental to their resulting promotions, merely to be placed in the position that they would have been in had the appointing authority properly graded the examinations initially.

This Court and others have previously recognized that an order granting retroactive promotion is distinct from an order directing retroactive benefits and that, despite the discretionary authority vested in the appointing officer, the latter award is available to a petitioner who has already been promoted in order to remedy the effects of unfair grading of the promotional exam (*see Matter of Abrams v Bronstein*, 33 NY2d 488; *McKernan v City of New York Civil Ser. Commn.*, 121 AD2d 350). In fact, the argument asserted by respondents and accepted by the majority -- that the award of retroactive benefits to petitioners would, like an order compelling appointment, undermine the appointing authority's discretionary power -- is not novel. In *Matter of Abrams* (*supra*), this Court rejected that identical claim. Relying on the pivotal fact that the petitioners had all already been appointed "in regular order according to the listings", the Court concluded that the proposed application of the "one-in-three" selection rule asserted to justify withholding those retroactive benefits from the petitioners "misses the point because the *petitioners are not asserting a right to be appointed but a right to equal benefits upon appointment*" (*id.* at 493, fn 6 [emphasis supplied]). Despite

its protestations to the contrary, the majority's holding cannot be reconciled with the underscored language in *Abrams*.

Since it would be impossible for the courts to interfere with the Fire Department's power to appoint the promoted firefighters because that appointing authority has already exercised its discretion by so doing, the sole inquiry for the courts concerns the remedy to be afforded petitioners to make them whole. Well-settled is the rule that a remedy should be coextensive with the wrong it is designed to redress (*Weissman v Evan*, 56 NY2d 458, 467). An award of retroactive back pay and seniority benefits calculated from the date the petitioners would have been promoted -- although "disapproved" of by the majority for reasons which remain to be explained (see Maj. opn at 7) -- is sufficient to redress the wrong to petitioners because it "restores [them] to the position in which [they] would have been had *** [they] timely been promoted" (*Matter of McKernan v City of New York Civil Serv. Commn.*, 121 AD2d 350, 352; *see also Anderson v County of Suffolk*, 97 AD2d 448, 449; CPLR 7806).

Contrary to respondent's assertion that the date the petitioners would have been promoted is speculative and thus impossible to determine, the Fire Department's policy of promoting in strict numerical order renders those dates readily ascertainable. Thus, in this case, the award of retroactive benefits may simply be calculated from the promotion date of the firefighter who previously held the ranking on the original list that is now held by the petitioner on the revised list. In fact, the record reveals that the Fire Department has utilized the same system in

the past to project retroactive seniority dates upon court-ordered regrading of a lieutenant's examination so that firefighters who would have been promoted by a certain cutoff date after the reranking could be certified as eligible in time to take the promotional exam for Captain.

In sum, because I cannot agree that a court's award of back pay to petitioners after they have been duly appointed is inconsistent with the "one-in-three" rule, and because the majority's justification for denying retroactive benefits to civil servants who have been promoted belatedly is unconvincing and departs from this Court's clear precedent, I would modify the Appellate Division order insofar as it granted such relief to the retired petitioners, and otherwise affirm the awards to those petitioners and intervenors already promoted by the Commissioner.

* *

Chief Judge KAYE and Judges SIMONS, HANCOCK, Jr., BELLACOSA and SMITH concur with Judge LEVINE; Judge TITONE dissents in part in a separate opinion.

Order reversed, etc.

Appendix B - Decision And Order of The Supreme Court of The State of New York, Appellate Division, First Department, Entered October 13, 1992 (186 A.D. 2d 423) [Pages 15a - 17a]

In the Matter of the Application of
Lawrence Andriola, et al.,

Petitioners-Respondents,

For Judgment pursuant to Article 78
of the CPLR,

-against-

Juan U. Ortiz, etc., et al.,

Respondents-Appellants,

-and-

William Barrett, et al.,

Intervenors-Respondents.

Order and judgment (one paper), Supreme Court, New York County (Kristin Booth Glen, J.), entered October 31, 1991, which grants petitioners and intervenors seniority benefits and back pay, retroactive to the dates that they would have been promoted, if their promotional examinations had been correctly graded in the first instance, is unanimously affirmed, without costs.

Petitioners were New York City Firefighters when they instituted the instant Article 78 proceeding to challenge the respondents' grading of twelve questions on promotional examination number 0511, given October 31, 1981, for the position of Fire Department Lieutenant.

After the examination was regraded a special eligible list was prepared, and those petitioners on active service were promoted. The other petitioners retired.

Thereafter, petitioners moved for retroactive back pay and seniority benefits, and were joined by intervenors, who were promoted from the revised list.

On appeal respondents contend that the "one in three rule", contained in Civil Service Law § 61, as well as in rule 4.7.1 of the Rules of the New York City Department of Personnel (59 RCNY Appendix A, 4.7.1) bars the award of retroactive benefits to the petitioners, upon the ground that such an award would undermine the discretionary power of the appointing authority. They further contend that the award to the intervenors is barred by the constitutional proscription against gifts of public funds.

Since the petitioners have all already been promoted, and those promotions were made pursuant to the long-standing practice and tradition of the Fire Department to promote in strict numerical order, rather than by use of the "one in three rule", the award of retroactive benefits will not interfere with the discretionary power of the appointing authority. The relief granted simply places the petitioners who had not retired in the same position that they would have been in if the examination had been correctly graded in the first place (*see Matter of McKernan v City of New York Civ., Serv. Commn.*, 121 AD2d 350, 352, *lv denied* 69 NY2d 607). "[P]etitioners are not asserting a right to be appointed but a right to equal benefits upon appointment." (*Matter of Abrams v Bronstein*, 33 NY2d 488, 493, n 6).

We agree with the IAS Court that equal protection entitles the intervenors to the same retroactive relief as has been awarded to the petitioners, and the retired petitioners the relief granted to them. The relief properly places them, as nearly as possible, in the position they would have been had the test been properly graded in the first instance (*Abrams, supra*).

We have examined the respondents' remaining arguments and find them to be without merit. Concur - Ellerin, J.P., Wallach, Ross, Kassal and Rubin, JJ.

Appendix C - Decision of Kristin Booth Glen, J., Supreme Court State of New York, County of New York, Dated June 21, 1991 [Pages 18a - 32a]

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 26

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LAWRENCE ANDRIOLA, JAMES A. BURKE, THOMAS J. CAPANELLI, JOHN CIORCIARI, LAWRENCE E. CONNORS, JOAQUIM P. DA SILVA, ALFRED J. PAUVEL, ANTHONY L. FRAVOLA, JOSEPH J. KENNINGTON, ROBERT W. LINHART, JOSEPH LUNZ, JOSEPH MARAGLINO, PATRICK H. MC DERMOTT, JAMES R. MC ENROE, THOMAS M. MC MAHON, PETER T. MORGAN, JOHN F. MULVEY, RAYMOND NEGRYCZ, JAMES W. O'BRIEN, ROBERT J. O'HARA, RUSSELL L. OLSON, JOHN F. PETERSON, MICHAEL JOHN PUZZIFERRI, THOMAS F. REGAN, RICHARD J. SMITH and JOSEPH SOLAZZO,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

Index No. 29966/82

-against-

JUAN U. ORTIZ, as City Personal Commissioner, Department of Personnel, and as Chairman of the Civil Service Commission of the City of New York, and JOSEPH E. SPINNATO, as Fire Commissioner of the City of New York,

Respondents,

-and-

WILLIAM BARRETT, JOSEPH BACCARI, JAMES O'DONNELL, on behalf of themselves and other successful candidates on Promotion List 5608 (Lieutenant, NYC Fire Department) as members of Lieutenant Eligible Association 5608,

Intervenors-Respondents.

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APPENDIX C
[Decision of The Supreme Court State of New York]

KRISTIN BOOTH GLEN, J.:

Motions numbered 004, 005, 006 and 007 of Index No. 29966/82 on the Part 20 calendar for April 24, 1990 are consolidated for disposition.

Procedurally, this case was first before me pursuant to an Article 78 petition challenging the grading of twelve questions on the promotional exam for the position of fire Department Lieutenant given October 31, 1981. ("Exam No. 0511"). The report of the Referee was confirmed, and a special eligible list was promulgated, after order entered August 5, 1988. All of the petitioners were appointed to the position of Lieutenant from the revised list. Those petitioners now seek modification of the August 5, 1988 order to provide for retroactive back pay and seniority benefits. (Motion 004). The remaining motions seek intervention by various parties and support the request for modification of the August 5th order. (Motions 005, 006 and 007).

Respondents argue that petitioners' requested modifications are barred by Civil Service Law § 61 which grants the Fire Department, and other public agencies, discretion in appointing or promoting candidates to positions from an "eligible" list established by a competitive examination.[1] Thus, according to respondents, Civil Service

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[1] Civil Service Law § 61 reads, in relevant part, as follows:

"...§ 61. Appointment and Promotion

1. Appointment or promotion from eligible lists.

Law § 61 rebuts any claim of entitlement to the title of Lieutenant[2], and retroactive pay and seniority cannot be awarded to petitioners. Respondents cite a series of cases in which the courts have consistently refused to mandate an individual's appointment from a list, with concomitant benefits, on the basis that to do so would encroach on the power of the appointing officials. See, *Schenectady v. State Division of Human Rights*, 37 NY2d 421 (1975); *Burger v. Walsh*, 291 NY 220 (1943); *Delicati v. Schechter*, 3 AD2d 19 (1956); cf. *Mena v. D'Ambrose*, 58 AD2d 514 (1st Dept 1977), *mod. on other grounds*, 44 NY2d 428 (1978).

Conceding the general validity of this proposition, however, petitioners argue its inapplicability here, distinguish the cases cited for the general proposition,[3] and point to

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> Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion ... (Civil Service Law, § 61(1)).

[2] The issue of "entitlement" becomes particularly important in federal constitutional due process analysis. See *Drogan v. Ward*, 675 F Supp. 832 (S.D. N.Y. 1987) as discussed and distinguished in *Matter of Deas v. Levitt*, 73 NY2d 525 (1989) *cert. den.* 110 S. Ct. 324 (1989), "Entitlement" or a Finding of a "property right" for purposes of *Matthews v. Eldridge*, 424 US 319 (1976) is, however, entirely different than what is necessary for a "make whole" remedy once a particular petitioner or plaintiff has moved past the hypothetical "entitlement" to the realty of reinstatement or, promotion. See, e.g., *Cottongim v. Onondaga Sheriff's Department*, 71 NY2d 623 (1988) (reinstatement) *McKernan v. City of New York Civil Service Commission*, 121 AD2d 350 (1st Dept. 1986) *lv. den.* 69 NY2d 607 (1987). (promotion)

[3] In *Burger v. Walsh, supra*, the plaintiffs were candidated for the

several cases more nearly on point which compel the relief they seek. See, e.g., *Abrams v. Bronstein*, 33 NY2d 488 (1974), *Cottongim v. County of Onondaga Sheriff's Department, supra, McKernan v. City of New York Civil Service Commission, supra.* In each of these cases, retroactive relief was granted in order to make the petitioner or petitioners "whole."

Where the appointing authority's "discretionary power" is not undermined in the case - either because the petitioner seeks reinstatement after a discriminatory termination, *Cottongim, supra,* or the appointing authority has already exercised its discretion by appointing or promoting, e.g., *Abrams, supra, McKernan, supra,* - the appropriate remedy is one which put the employee or employees in the position which s/he or they would have been in but for the unlawful (*Cottongim*) or erroneous (*Abrams*) or illegal (*McKernan*) acts of the authority.

Fire Department who claimed they had been improperly "passed over" for appointment and sought retroactive appointment. The Court of Appeals denied their application holding that to do so ". . . would in effect the deprive the Commissioner of the power of selection which is implicit in the authority granted him as an appointing officer. . ." 291 NY2d at p 223 (citations omitted). There was no indication in that case that all applicants who passed were appointed. In *City of Schenectady v. State Division of Human Rights, supra,* the court held that the Commissioner of Human Rights could not compel the City to offer the complainant the next available position as police sergeant. In that case it was also clear that discretion was regularly employed in such appointments. In *Mena v. D'Ambrose, supra,* involving the New York City Transit Police Department, prior use of the "one in three" discretionary power of appointment was not only understood as the practice of the Department, but was also actually incorporated in the stipulation agreed to by all parties but the chairman of the Transit Authority. *Mena, supra,* 44 NY2d at 432.

Both *Abrams* and *McKernan*, are factually similar to the situation in this case. In both cases, the "one in three" rule of Civil Service Law § 61 was irrelevant to awarding back pay and retroactive seniority because the petitioners had already been appointed. Thus the court found that ". . .[the Civil Service Law § 61] justification misses the point because the petitioners are not asserting a right to be appointed but a right to equal benefits upon appointment." *Abrams, supra,* at 493, Footnote 6. In *McKernan*, as well, by the time the issue of retroactivity reached the Appellate Division, the petitioners had already been promoted from a makeup list.[4]

Given the fact that the appointments had already occurred, the two issues before the Appellate Division were retroactive seniority and back pay. The test was, as in other cases, what would make these already promoted employees, who had been delayed in their promotion because of the mishandling of a test by the Department, "whole." As to retroactive seniority, the Department conceded "that such seniority should be granted to petitioner, or any similarly eligible candidate who is actually

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[4] This case involved the same promotional examination as presented here, but in a slightly different context. The petitioner in *McKernan* was a firefighter who was unable to take the exam because he was on line of duty leave at the time. He brought a proceeding to compel a prompt makeup exam, which was granted by the trial court. *McKernan v. City of New York Civil Service Commission,* 127 Misc 2d 946 (S. Ct. New York Co. 1985). The trial court set an outside date for holding such an exam, but when the case was argued in the Appellate Division, the question of the court's power to do so became moot, as the exam had already occurred. McKernan had successfully taken the exam and been promoted, as is and has been the practice of the Department. See discussion *infra*.

promoted from the make up examination list." The only question was whether such seniority should run from the date of the exam, or the date on which the employee would have been promoted had he taken the original exam. The Department argued for the latter, the petitioners conceded, and the Appellate Division so held.

As to retroactive back pay, the court held that it, like retroactive seniority, should "equitably be granted" only from the date the petitioner would have been appointed had he taken the original examination. In language directly applicable to the instant case, the court wrote:

> While appellants contend that petitioner has no legal right to any back pay, it appears that such an award is the appropriate remedy to make petitioner whole and rectify the consequences of delay in administering the makeup examination. The back pay does not constitute an award of monetary damages, but is, rather, incidental to the primary relief sought by petitioner, in that it restores him to the position in which he would have been had a proper makeup examination been given so that he could timely have been promoted, if eligible. (CPLR 7806; See, e.g. *Anderson v. County of Suffolk*, 97 AD2d 448) *McKernan, supra* at p. 352.

Here, as in *Abrams* and *McKernan*, the petitioners have already been promoted from the revised list. Thus they seek nothing which would in any way impinge upon the discretionary authority of the Department, which has already been exercised in their favor. In their reading and reliance upon various cases cited by them, the respondents confuse rights and remedies. The petitioners here do not seek the right to be promoted, which the courts have found is not a "right" given Civil Service Law § 61. They have been promoted, so that right, opportunity, or guarantee of

fair consideration is no longer at issue.

The only remaining question is what *remedy* will make them whole. The respondents, having remedied the original error, that is the mis-scoring of the promotional exam, and the petitioners having been promoted in accordance with whatever discretionary authority the Department might or could exercise,[5] the petitioners can and should be made whole by being given retroactive seniority to the date on which they would have been promoted had the exam initially been correctly scored,[6] and back pay as well.

Because the petitioners here have actually been promoted, it is not necessary to consider their other arguments, but one in particular deserves note. Affidavits submitted with their papers included one from John J. O'Rourke, former Chief of the New York City Fire Department, whose career spanned a thirty-three year period from 1953 to 1986. Former Chief O'Rourke attested, from personal knowledge, to the fact that from 1953 to date the Fire Commissioner has never invoked the "one in three" rule on promotions to the rank of Lieutenant, Captain, Battalion Chief and Deputy Chief. He also stated his belief that, as a matter of practical reality, petitioners here would certainly have been promoted in strict numerical order had their examinations been originally

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5 See discussion *infra*.

6 Although the respondents somewhat inexplicably argue that this calculation is impossible, it is precisely the calculation they performed in McKernan, and thus it is clear that they know precisely how to do it. The procedure is also set forth in *Abrams* at Footnote 2, p. 491.

correctly graded by the respondents on dates that were easily ascertainable. Petitioners also submitted articles from the Civil Service newspaper, the *Chief/Leader*, concerning the McKernan case in which the Assistant Chief to the Law Department, Appeals Division was quoted as saying:

> . . . it has always been the practice and in fact the law requires, that when an answer on an exam was changed because of *Acosta* litigation we were required to rewrite all the papers. It has been the practice in these cases to grant retroactive seniority to all the parties involved.

The respondents thereafter submitted the affidavit of Madelyn Oliva, Assistant Commissioner for Personnel of the Fire Department, which set forth several instances in which persons on eligible lists had not automatically been promoted or "selected." Respondents argued that Ms. Oliva's affidavit demonstrated that in fact the "one in three rule" had been invoked in the past, and that the petitioners here were not automatically assured promotion based on their passing the exam.

In a sur-reply affidavit submitted by the petitioners, the circumstances of each of the cases set forth in Ms. Oliva's affidavit were explained. None actually involved strict invocation of the "one in three rule." Rather, in all the cases, because of the particular applicant's physical or other incapacity at the time of the promotional selection, the applicant was "passed over" in accordance with department procedures, and subsequently considered when capable of taking the promotion. In each of those instances the applicant was ultimately promoted.

This careful explanation by petitioners demonstrates not only that the "one in three rule" has never been used

to deny promotion, but reaffirms the Department's commitment to automatic promotion, based on position on the list or seniority, so long as the applicant is physically and otherwise capable of accepting the position, as the petitioners here clearly are.

Thus, had this case come to me prior to the actual promotion of the petitioners (and intervenors, as discussed *infra*), the same result would have occurred. Since petitioners have convincingly demonstrated that the discretion which cases like *Schenectady v. State Division of Human Rights, supra; Burger v. Walsh, supra, and Mena v. D'Ambrose, supra,* sought to protect was deliberately never exercised as a matter of Fire Department policy, concerns about Civil Service Law § 61 need not prevent the relief which they requested.

However, since whatever hypothetical possibility might have existed at the time of my original order has now been removed because of the actual promotions by the Department, there can be no question that the petitioners are entitled to the retroactive seniority and back pay which they request, such seniority and back pay to be computed for each petitioner (and intervenor) from the date on which s/he would have been promoted off the original list had the test been properly graded.

MOTION OF INTERVENORS

In Motions numbered 006 and 007 various firefighters who took the same promotional exam as the petitioners in *Andriola* seek leave to intervene pursuant to CPLR § 1013, to amend the caption of the action to

include their names, and for relief identical to that sought by the *Andriola* petitioners. Generally, where a common issue of law or fact is present a proposed party will be granted leave to intervene where it will not unduly delay the action or proceeding, *Norstar Apts. Inc. v. Town of Clay*, 112 AD2d 750 (4th Dept. 1985) and the proposed party's action or proceeding is not otherwise time-barred. *Millington v. Southeastern Elevator Co.*, 22 NY2d 498 (1968). I note that the parties have consented to the intervention of Mr. Abbott (Mot. 007). Therefore, I grant him leave to intervene on that basis.

As a preliminary issue, the respondents oppose the proposed intervenors' Motion (006) on the grounds that it is time-barred. Respondents argue that the action challenged in the underlying *Andriola* proceeding, issuance of the answer key to Exam No. 0511, became final and binding on August 4, 1982 or at the very least when the proposed intervenors were promoted from the special list and thus the four month statute of limitations set forth in CPLR § 217 has long since expired. Although it is true that the intervenors may not challenge the answer key or the special promotion list at this late date, this is not the basis on which they are entitled to seek intervention.

All of the proposed intervenors, although not petitioners in the original *Andriola* action, had their exams regraded and were placed on the special eligible list for the title of Lieutenant, F.D. as a result of their regrading. In addition, like the *Andriola* petitioners, all of the proposed intervenors were subsequently promoted to the rank of lieutenant as a result of their regrading and their placement on the special eligible list. The relief which they seek, like

the *Andriola* petitioners, would do no more than make them "whole" because of the Department's error in grading the original exam.

This is almost the precise situation which occurred in *Abrams, supra*, where the Court of Appeals held that it would be a denial of equal protection to permit such relief for persons participating in the original litigation (who, in that case, received some relief as a result of a stipulation) but deny it to those whose exams were also incorrectly graded but who were not petitioners. The court found, as a matter of both State and Federal Equal Protection, that the benefits granted to those participating in the litigation must also be granted to others whose lack of benefits similarly resulted from faulty grading of the promotional exam. *Abrams, supra*, at 495.

Respondents argue, alternatively, that if the proposed intervenors' claim is based on the *Abrams* equal protection theory, the claim is not yet ripe. Their argument is based on the view that first the *Andriola* petitioners would have to prevail on their motion to amend my 1988 order, and thereafter the proposed intervenors would have to request the same relief from Respondents. Only in the event that the proposed intervenors' requests were to be denied would their *Abrams* claim be ripe for review.

The proposed intervenors concede that their claim is an *Abrams* claim which is contingent upon the claims of *Andriola* petitioners and does not become cognizable unless and until the *Andriola* petitioners prevail on their motion. They argue persuasively, however, that it would be in the interests of judicial economy and would cause no prejudice to any party to dispose of all of these related claims

together in this Article 78 proceeding. Therefore I grant the proposed intervenor's motion to intervene only to the extent of permitting them to raise the *Abrams* Equal Protection claim. Since I have held in favor of the *Andriola* petitioners in this decision, the same result must apply here, and accordingly Motions 006 and 007 are granted. Therefore I hold that the intervenors are entitled to the same relief the *Andriola* petitioners have here been awarded.

PROPOSED PETITIONER/RETIREES

Motion No. 005 presents a more complicated issue. This motion was brought on behalf of four now retired firefighters, Joseph Lunz, Joseph Maraglino, Raymond Negrycz and Robert J. O'Hara. All four were original petitioners in the *Andriola* action, but all retirees prior to June 19, 1989, the date on which the revised promotional list was promulgated. All four received scores, after the regrading, which would have entitled them to be placed on the list assuming they passed the oral examination scheduled by the Department in the Spring of 1989 after the regrading occurred.[7]

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[7] It appears that promotion depends not only on a passing grade on the written examination, but also on passing a subsequent oral examination. Since the *Andriola* petitioners and the intervenors did not originally receive passing grades on the written examination, they did not take the oral examination which followed. Consequently, as a result of my 1988 decision, after rescoring the exam, a new oral examination was scheduled. Although it is not clear from these papers, it appears that everyone who took that examination passed it. Certainly that is true for all the *Andriola* petitioners, and the intervenors, all of

APPENDIX C
[Decision of The Supreme Court State of New York]

In the original affidavit in support of retroactive seniority and back pay for the four retirees, their attorney stated that only one, Maraglino was notified of the oral examination. According to that affidavit, he took the oral examination and passed it. However, the retiree movants claimed that O'Hara, Negrycz and Lunz were not notified of the examination, did not take it, and so did not pass, thus making them ineligible for promotion.

In answering papers, the Department furnished copies of letters sent to the three movants who claim not to have been notified of the exam. Those letters clearly notified them of the exam and of what was necessary in order to take it. In a reply affidavit, the attorney for the three concedes that they received the notification, and indeed that they actually took the exams, but that the Department refused to grade them and informed the three "that they would not be considered for promotion because they were already retired."

These four retiree/movants thus stand in a different position than the other *Andriola* petitioners and the intervenors, and also stand in different positions among themselves. None have actually already been promoted, as is the case with the other *Andriola* petitioners and the intervenors. Thus the first portion of my holding does not apply. However, as to Maraglino, who took and passed the oral examination, was found to have passed, and was added

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whom were, as previously noted, subsequently promoted to Lieutenant. The attorney's affidavit submitted in support of Motion 005 states that "on information and belief, all Firemen [sic] who took the oral examination passed the oral examination. This was true whether referring to the oral examination given in the spring of 1989 or the oral examination that was given following respondents' mistaken grading in August 1982."

to the list, the second ground for my holding, that is the Department's policy of automatic promotion and non-application of the "one in three" rule requires that the relief granted to the other petitioners be granted to him as well. That is to say, Maraglino should be entitled to retroactive seniority and back pay as of the date on which he would have been promoted had the original exam been correctly graded.[8]

With regard to retirees Lunz, Negrycz and O'Hara, respondents have submitted no further information. Thus it is not possible to determine whether, as they claim, they took the oral exams which were not graded, whether they passed the exams, or whether this information, like that submitted in their first affidavit, is also incorrect.

Accordingly, based on the unrebutted statements that the oral exams were taken, but not graded, the appropriate remedy here appears to be an order requiring the department to grade those exams and certify whether the three retirees did or did not pass. If they are certified to have passed, they are in the same position as Maraglino and the same relief which he has been granted should

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[8] I recognize in making this determination that I have accepted petitioners' argument that, but for one instance, the "one in three" rule has never been applied by the department to deny promotion to someone otherwise capable of receiving the promotion at that time. The Oliva affidavit suggest that there may be other cases, although they are unnamed, unspecified, and presumably less strong than those to which she specifically refers. In the event that the papers submitted here do not accurately reflect the situation in the Department, as attested to both by Chief O'Rourke's affidavit, and the various quotes from department officials reported in the *Chief/Leader* stories, respondents may move for reargument as to my decision on Maraglino.

apply. If the oral exams are graded and the three retirees do not pass, the Department may so find, and refuse to certify them, leaving the retirees with whatever rights they may have to challenge that determination. Finally, if the department cannot now grade those oral examinations, it must promptly schedule a make-up examination so that Lunz, Negrycz and O'Hara can be put in the position which they would have been had the original exam been correctly graded.

Settle order in accordance with my decision.

Dated: June 21, 1991

s/_____
KRISTIN BOOTH GLEN
J.S.C.

Appendix D - Order And Judgment of Kristin Booth Glen, J., Supreme Court of The State of New York, Appellate Division, First Department, Entered October 31, 1991 [Pages 33a - 37a]

IAS20
Supreme Court of the State of New York held in and for the County of New York at IAS Part 26 of the County Courthouse in the City of New York on the 18th day of September, 1991

PRESENT:

Hon. Kristin Booth Glen
Justice

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LAWRENCE ANDRIOLA, JAMES A. BURKE, THOMAS J. CAPANELLI, JOHN CIORCIARI, LAWRENCE E. CONNORS, JOAQUIM P. DA SILVA, ALFRED J. PAUVEL, ANTHONY L. FRAVOLA, JOSEPH J. KENNINGTON, ROBERT W. LINHART, JOSEPH LUNZ, JOSEPH MARAGLINO, PATRICK H. MC DERMOTT, JAMES R. MC ENROE, THOMAS M. MC MAHON, PETER T. MORGAN, JOHN F. MULVEY, RAYMOND NEGRYCZ, JAMES W. O'BRIEN, ROBERT J. O'HARA, RUSSELL L. OLSON, JOHN F. PETERSON, MICHAEL JOHN PUZZIFERRI, THOMAS F. REGAN, RICHARD J. SMITH and JOSEPH SOLAZZO,

Index No. 29966/82

Petitioners,

ORDER/ JUDGMENT

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

-against-

JUAN U. ORTIZ, as City Personal Commissioner, Department of Personnel, and as Chairman of the Civil Service Commission of the City of New York, and JOSEPH E. SPINNATO, as Fire Commissioner of the City of New York,

Respondents,

[Order And Judgment of Supreme Court State of New York]

-and-

WILLIAM BARRETT, JOSEPH BACCARI, JAMES O'DONNELL, on behalf of themselves and other successful candidates on Promotion List 5608 (Lieutenant, NYC Fire Department) as members of Lieutenant Eligible Association 5608,

Intervenors-Respondents.

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Petitioners, LAWRENCE ANDRIOLA, THOMAS J. CAPANELLI, LAWRENCE E. CONNORS, JOAQUIM P. DA SILVA, ANTHONY L. FRAVOLA, JOSEPH J. KENNINGTON, PATRICK H. MC DERMOTT, JAMES R. MC ENROE, PETER R. MORGAN, JOHN F. MULVEY, RUSSELL L. OLSON, JOHN F. PETERSON, MICHAEL JOHN PUZZIFERRI, THOMAS R. REGAN, and RICHARD J. SMITH (hereinafter "ANDRIOLA Petitioners"), by their former attorney, STEPHEN M. BEHAR, having duly moved this Court by Notice of Motion dated October 12, 1989, for an Order modifying the prior Order and Judgment of this Court and granting each of the movants the back pay due and owing to them from the date that they should have been promoted through the dated of their actual promotion and granting each of the movants full seniority benefits *nunc pro tunc* to the date that they should have been promoted (hereinafter "ANDRIOLA Petitioner's Motion to Modify"). The undersigned counsel for petitioners was substituted for Attorney Behar by consent of the parties, and

Proposed Petitioners-Intervenors, MICHAEL ANTINORO, PETER BIANCHINI, ROBERT BRADLEY,

[Order And Judgment of Supreme Court State of New York]

ALLEN DEL GANDIO, EDWARD ELLISON, HERBERT FISCHER, WILLIAM GRONEMAN, JOHN GULOTTA, ADOLF HUTTER, JOHN KLEEHAAS, JAMES KLESS, DOUGLAS KRUGER, CORNELIUS LEHANE, CHARLES McCARTHY, DONALD McCULLOUGH, DENIS NEIGAN, LEROY O'NEIL, ERIC REHBEIN, JOHN REILLY, DENNIS SCANLON, FRANCIS SHANAGAN, JOHN STACK, PATRICK WELSH, SAM WHITE and CHARLES WILLIAMS (hereinafter "ANTINORO Petitioners"), by their attorneys, COLLERAN, O'HARA & MILLS having duly moved this court by Notice of Motion for an Order pursuant to CPLR §1013 permitting the intervention of the ANTINORO Petitioners, and directing the amendment of the caption in this proceeding accordingly (hereinafter "ANTINORO Petitioner's Motion to Intervene") and

Proposed Petitioner-Intervenor, RICHARD J. ABBOTT, JR. (hereinafter "ABBOTT"), by his attorneys, COLLERAN, O'HARA & MILLS, having duly moved this Court by Notice of Motion for an Order pursuant to CPLR §1013 permitting ABBOTT's intervention as a Petitioner-Intervenor, and directing the amendment of the caption in this proceeding accordingly (hereinafter "ABBOTT's Motion to Intervene"), and said Motions having regularly come on to be heard;

NOW upon reading and filing the Notice of Motion dated October 12, 1989, the affirmation of Stephen M. Behar, dated October 12, 1989, the affidavit of John J. O'Rourke, sworn to February 23, 1990, the Reply Affidavit of John F. Mills, sworn to March 1, 1990, the Affidavit of John J. O'Rourke sworn to March 23, 1990, the Sur-Reply

[Order And Judgment of Supreme Court State of New York]

Affidavit of John F. Mills, sworn to March 23, 1990, in support of ANDRIOLA's Motion to Modify, and the Affirmation of David L. Lock, dated December 22, 1989 and the affidavit of Madelyn Oliva, sworn to March 15, 1990, in opposition to ANDRIOLA's Motion to Modify; and

Upon reading and filing the Notice of Motion, the affidavit of John F. Mills, sworn to February 15, 1990 and the Reply Affidavit of John F. Mills, sworn to April 20, 1990, in support of ANTINORO's Motion to Intervene, and the affirmation of David L. Lock, dated April 16, 1990, in opposition to ANTINORO's Motion to Intervene, and

Upon reading and filing the Notice of Motion, the affidavit of John F. Mills, sworn to March 9, 1990, the Reply Affidavit of John F. Mills, sworn to April 20, 1990, in support of ABBOTT's Motion to Intevene, and the Affirmation of David L. Lock, dated April 18, 1990, in opposition to ABBOTT's Motion to Intervene, and after due deliberation having been held thereon, and upon the decision of this Court dated June 21, 1991;

NOW, upon motion of Colleran, O'Hara & Mills, attorneys for the ANDRIOLA petitioners, the ANTINORO petitioners and ABBOTT, it is hereby

ORDERED, that the application of the ANTINORO petitioners to intervene is granted and that the caption of this case be amended accordingly; and it is further

ORDERED that petitioner, ABBOTT's application to intervene is granted and that the caption of this case be amended accordingly; and it is further

ORDERED AND ADJUDGED, that

[Order And Judgment of Supreme Court State of New York]

ANDRIOLA's Motion to Modify is granted in its entirety and the ANDRIOLA petitioners, the ANTINORO petitioners, and ABBOTT are awarded retroactive back pay from the date that they should have been promoted through the date of their actual promotion, and full seniority and pay longevity benefits *nunc pro tunc* to the date that they would have been promoted had the exam initially been correctly scored.

ENTER:

s/_____
J.S.C.

s/_____
Clerk

Appendix E - Decision of Kristin Booth Glen, J., Supreme Court of The State of New York, Appellate Division, First Department, Dated May 4, 1988 [Pages 38a - 40a]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 20

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LAWRENCE ANDRIOLA, JAMES A. BURKE, THOMAS J. CAMPANELLI, JOHN CIORCIARI, LAWRENCE E. CONNORS, JOAQUIM P. DA SILVA, ALFRED J. FAUVELL, ANTHONY L. FRAVOLA, JOSEPH J. KENNINGTON, ROBERT W. LINHART, JOSEPH LUNZ, JOSEPH MARAGLINO, PATRICK H. MC DERMOTT, JAMES R. MC ENROE, THOMAS M. MC MAHON, PETER T. MORGAN, JOHN F. MULVEY, RAYMOND NEGRYCZ, JAMES W. O'BRIEN, ROBERT J. O'HARA, RUSSELL L. OLSON, JOHN F. PETERSON, MICHAEL JOHN PUZZIEFERRI, THOMAS F. REGAN, RICHARD J. SMITH and JOSEPH SOLAZZO,

Petitioners,

Index No. 29966/82

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

-against-

JUAN U. ORTIZ, as City Personnel Commissioner Department of Personnel, and as Chairman of the Civil Service Commission of the City of new York, and JOSEPH E. SPINNATO, as Fire Commissioner of the City of New York,

Respondents,

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KRISTIN BOOTH GLEN, J.:

This Article 78 proceeding was brought to challenge the New York City Fire Department and New York City Department of Personnel in their grading of 12

questions on the Promotion Examination for the position of Fire Department Lieutenant given on October 31, 1981. A hearing before Special Referee Diamond was held, pursuant to an order of reference, dated October 14, 1986. Referee Diamond has issued an extensive and detailed 33 page report which found that petitioner's answers to questions 51, 75 and 80 were as good as the answers credited by respondents and that their answers to questions 3, 13, 14, 21, 30, 57, 97 and 99 were not and that respondent's had withdrawn question 71.

Petitioners move to confirm in part the findings as to questions 51, 75, 80 and 71 and to disaffirm the other findings. Respondents cross-move to confirm the report in its entirety. Intervenor-respondents, successful candidates on a subsequent test for Fire Department Lieutenant, seek to have the life of their promotional list extended for a period equivalent to any extension of the eligible list arising out of the October 31, 1981 examination.

Upon review of the transcript of the proceedings and exhibits submitted in evidence before the referee the court finds that the report of the referee is amply supported by the record and that the recommendations of the referee concerning the regrading of the examination be adopted.

Accordingly, the respondent's cross-motion to confirm the report in its entirety in granted and the motion by petitioners to modify is denied. Respondents are directed to regrade all examinations taken on October 31, 1981 to reflect the revised grading and to compile a special eligible list within 30 days of service of the judgment to be settled hereon. Further, where it is demonstrated that

errors have rendered and eligible list in derogation of the merit and fitness standards of the New York Constitution (Art. V, §6) and that candidates have been aggrieved by the errors, the statutory durational period for appointment from the list for the aggrieved petitioners does not begin to run until the list is corrected (*Matter of Mena v. D'Ambrose*, 44 N.Y.2d 428, 406 N.Y.S.2d 22, (1978); *Cataldo v. Ortiz*, New York County Sup. Ct., Index No. 15819/83, Stecher, J., aff'd 133 A.D.2d 1022, 519 N.Y.S.2d 913 [1st Dep't 1987], app. den. 70 N.Y.2d 616, ___N.Y.S.2d___[1988]. Petitioners are thus entitled to the continuation of the special eligible list for a period of time consistent with Civil Service Law §56 commencing at the time when the list is corrected (Id.). Additionally, the eligible list for the intervenor-respondents who took and passed exam 5608 shall also be extended to compensate them for the number of displacements resulting from petitioners being appointed from the special eligible list during the life of the eligible list promulgated from exam 5608.

Settle judgment in accordance with the foregoing.

ENTER: May 4, 1988

s/_____
KRISTIN BOOTH GLENN
J.S.C.

Appendix F - Order And Judgment of Kristin Booth Glen, J., Supreme Court of The State of New York, Appellate Division, First Department, Entered August 5, 1988 [Pages 41a - 44a]

At an IAS Part 20 of the Supreme Court of the State of New York, County of New York, held at the Courthouse, 60 Centre Street, New York, on the 11th day of July 1988.

PRESENT: HON. KRISTEN BOOTH GLEN
Justice

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LAWRENCE ANDRIOLA, JAMES A. BURKE, THOMAS J. CAMPANELLI, JOHN CIORCIARI, LAWRENCE E. CONNORS, JOAQUIM P. DA SILVA, ALFRED J. FAUVELL, ANTHONY L. FRAVOLA, JOSEPH J. KENNINGTON, ROBERT W. LINHART, JOSEPH LUNZ, JOSEPH MARAGLINO, PATRICK H. MC DERMOTT, JAMES R. MC ENROE, THOMAS M. MC MAHON, PETER T. MORGAN, JOHN F. MULVEY, RAYMOND NEGRYCZ, JAMES W. O'BRIEN, ROBERT J. O'HARA, RUSSELL L. OLSON, JOHN F. PETERSON, MICHAEL JOHN PUZZIFERRI, THOMAS F. REGAN, RICHARD J. SMITH and JOSEPH SOLAZZO,

Petitioners,

Index No. 29966/82

-against-

ORDERED and JUDGMENT

JUAN U. ORTIZ, as City Personnel Commissioner, Department of Personnel, and as Chairman of the Civil Service Commission of the City of New York, and JOSEPH E. SPINNATO, as Fire Commissioner of the City of New York,

Respondents.

----------x

Petitioners are twenty six (26) New York City Firemen.

By Petition dated November 19, 1982, Petitioners challenged decisions, made by the New York City Fire Department and the New York City Department of personnel in the grading of twelve (12) questions on the promotional

examination for the position of Fire Department Lieutenant given October 31, 1981.

The Petitioners contended that Respondents erred in not designating certain answer choices as correct answers to these twelve (12) questions, and further erred in failing to delete some examination questions which had no correct answer.

Respondents written answer disputed the petition on every issue. By an order of reference dated October 14, 1986 the issues were referred to Special Referee Donald Diamond. On the 29th day of July, 1987, Referee Diamond made and filed his report.

Thereafter, by notice of motion dated November 20, 1987 and the annexed affirmation of their attorney, Ronald Podolsky, intervenor-respondents moved to intervene in this matter. On January 5, 1988 this Court granted intervenor-respondents' motion to intervene per the stipulation dated December 31, 1987 between the intervenor-respondents and Petitioners.

Petitioners then moved to confirm the Referee's findings as to questions 51, 75, 80 and 71 of the promotional examination and to disaffirm the Referee's other findings. Respondents cross-moved to confirm the Referee's report in its entirety. The intervenor-respondents sought to have the life of their promotional list extended for a period equivalent to any extension of the eligible list arising from the October 31, 1981 examination.

Upon reading and filing Petitioners' notice of motion to confirm in part, and reject in part, the Referee's report, dated September 25, 1987 and the affidavit of Petitioner's attorney, Stephen M. Behar, Esq. Sworn to Sept. 30, 1987

in support of Petitioners' motion with proof of due service thereof upon the attorney for Respondents; and upon reading and filing the Respondents' Notice of Cross Motion dated October 30, 1987 to confirm the recommendation of the Referree's report and the annexed affirmation of Grace Goodman, Assistant Corporation Counsel dated Oct. 15, 1987, in support of Respondents' cross motion, and due deliberation having been had thereon;

On May 4, 1988 this Court rendered its written decision on the aforementioned motions.

NOW, on motion of Stephen M. Behar, Esq., attorney for the Petitioners, and in accordance with this Court's decision of May 4, 1988 it is ORDERED that the cross motion is granted and the report is confirmed, and it is

ADJUDGED: That Petitioners have sustained the burden of proof in establishing that answer choices (B) and (D) are at least as good as the answer choice designated as the only correct answer to Question No. 51; and it is further

ADJUDGED: That Petitioners have sustained the burden of proof in establishing that answer (B) is at least as good as the answer choice designated as the only correct answer to Question No. 75; and it is further

ADJUDGED: That Petitioners have sustained the burden of proof in establishing that answer (A) is at least as good as the answer choice designated as the only correct answer to Question No. 80; and it is further

ADJUDGED: Question No. 71 was withdrawn from the examination, on consent of Respondents; and it is further

[Order And Judgment of Supreme Court State of New York]

ADJUDGED: That Petitioners have failed to establish that their proposed answers were as good as the credited answers to Questions No. 3, 13, 14, 21, 30, 57, 87 and 99; and it is further

ORDERED AND ADJUDGED: That Respondents are directed to regrade all examinations taken on October 31, 1981, to reflect the revised grading in accordance with the findings of this Court; and it is further

ORDERED AND ADJUDGED: That Respondents compile a special eligible list within thirty (30) days of service of the judgment; and it is further

ORDERED AND ADJUDGED: That the statutory durational period for appointment from the special eligible list for the aggrieved Petitioners does not begin to run until the list is corrected, and Petitioners are entitled to the continuation of the special eligible list for a period of time consistent with Civil Service Law §56 commencing at the time when the list is corrected; and it is further

ORDERED AND ADJUDGED: That the eligible list for the intervenor Respondents who took and passed exam 5608 shall also be extended to compensate them for the number of displacements resulting from Petitioners being appointed from the special eligible list during the life of the eligible list promulgated for exam 5608.

ENTER:

s/_____
J.S.C.

s/_____
Clerk